

### Remarks

Favorable reconsideration of this application is requested in view of the following remarks. For the reasons set forth below, Applicant respectfully submits that the claimed invention is allowable over the cited references.

The final Office Action dated April 15, 2005, indicated that the Specification is objected to under 35 U.S.C. § 112(1); that claims 1 and 33 stand rejected under 35 U.S.C. § 112(1); that claims 1 – 14, 20 – 28, 32 – 39, 44, 45, and 48 – 51 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby *et al.* (U.S. Patent No. 6,006,264, hereinafter the ‘264 reference) in view of Brendel *et al.* (U.S. Patent No. 5,774,660, hereinafter the ‘660 reference); that claims 15, 16, 29, and 40 – 43 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby in view of Brendel, and further in view of Miller *et al.* (U.S. Patent No. 5,920,701, hereinafter the ‘701 reference); claims 17, 46, and 47 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby in view of Brendel, and further in view of Wolpert (U.S. Patent No. 6,577,601, hereinafter the ‘601 reference); claims 18 and 19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby and Brendel in view of Wolpert, and further in view of Miller; claims 30 and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Colby in view of Brendel, and further in view of Reed *et al.* (U.S. Patent No. 5,862,325, hereinafter the ‘325 reference).

**OVERVIEW: The combined references do not correspond to the claimed limitations and the combination is unmotivated.**

The asserted prior art-based claim rejections in the Final Office Action fail because the proposed modification of the primary ‘264 reference renders it inoperable as asserted and because the cited portions of the references lack correspondence to the claimed limitations. In addition, the Section 112(1) claim rejections fail because the rejections rely upon requirements of the specification, not the claims, while failing to address supporting portions of the specification as cited by the Applicant. Moreover, the finality of the Office Action is improper in that the Examiner failed to address and provide a response to the Applicant’s arguments regarding, for example, the asserted teachings of the primary ‘264 reference, the impropriety of the Section 112 rejections and the unsupported inherency-type arguments, all made in the Office Action Response filed on January 7, 2005. If the

rejections are not removed, the Finality of the Office Action should be removed, the Examiner should answer the Applicant's arguments and provide the Applicant an opportunity to address the same, prior to the instant application going on Appeal.

**SECTION 112(1): The rejections are untenable.**

As discussed above, the Section 112(1) objection and rejections are improper because the cited portions of Section 112(1) alone are not a proper basis for the claim rejections and because the Specification describes the invention in a manner consistent with Section 112(1). In this regard, the Applicant pointed to specific portions of the specification in the Office Action Response filed on January 7, 2005 to facilitate the Examiner's review. However, the Examiner did not acknowledge these arguments detailing the impropriety of the Section 112(1) rejections to the Specification and the claims, or offer any response thereto.

To revisit the Applicant's arguments, the rejection of claims 1 and 33 under Section 112(1) is improper because, as indicated on page 2 of the Final Office Action, Section 112(1) is applicable to the specification. Consistent with the M.P.E.P., claim rejections that rely upon Section 112(1) are made where "the claims contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention." In this instance, no such rejection was made and, therefore, the claim rejections should be removed. Furthermore, as discussed in the Office Action Response filed on January 7, 2005 the Specification describes various examples involving a network-distributed application routing controller implemented in at least one user node. Applicable case law states that "[t]he written description requirement does not require the applicant 'to describe exactly the subject matter claimed, [instead] the description must clearly allow persons of ordinary skill in the art to recognize that [he or she] invented what is claimed.'" Union Oil Co. of California v. Atlantic Richfield Co., 208 F.3d 989 (Fed. Cir. 2000), *cert. denied*, 69 U.S.L.W. 3165 (Feb. 20, 2001) (No. 00-249) (quoting In re Gosteli, 872 F.2d 1008, 1012, 10 U.S.P.Q.2d 1614, 1618 (Fed. Cir. 1989) (citations omitted)).

Several examples in the specification and/or in the figures show and describe the implementation of a network-distributed application routing controller in at least one user

node. For example, referring to FIG. 3 and the corresponding discussion in the paragraph beginning on line 13 of page 12, an application routing controller 305 is implemented at various levels throughout the network, including levels at end-user nodes 320 and 321, used to route data to node 324. As further described in the Specification beginning at line 10 of page 12, the application routing arrangement uses “one or more of the system nodes [end user nodes] for transferring the data.”

In addition to the above-discussed support in the Specification, the Examiner further suggests, on page 5 of the Office Action, that “it was well known ... that system nodes and user nodes are interchangeable” and that “implementing routing controllers in user nodes was also well known in the art at the time of the present invention.” Applicant submits that these statements demonstrate that the requirements of Section 112(1) have been met; namely, one of skill in the art would be able to make and use the invention in view of the written description in the Specification. In attempting to maintain the Section 112(1) rejection over this subject matter on one hand, and stating that the same subject matter is well known in the art on the other hand, the Examiner has argued (in the scope of a few pages in the Office Action) that the subject matter is well-known yet not enabled. Applicant submits that this approach is untenable and requests that the Section 112(1) rejection be removed.

**MOTIVATION: The proposed modification is illogical.**

The Section 103 rejections also fail to establish a *prima facie* case of obviousness because the modification of the primary ‘264 reference, as asserted to correspond to the claimed limitations, would render the ‘264 reference inoperable for its intended purpose; where a proposed modification of a reference would render that reference inoperable, the proposed modification is unmotivated. *See, e.g., In re Gordon*, 733 F.2d 900, 221 U.S.P.Q. 1125 (Fed. Cir. 1984). Implementing the flow controller of the primary ‘264 reference with a user node and/or a server would remove the ‘264 reference’s purpose of routing requests from such a user node to a server, *i.e.*, where the flow switch forwards requests “based on the destination addresses in the packet headers.” *See*, column 6, lines 8-13. That is, modifying the flow controller to ascertain data location information and direct routing in response thereto would undermine the flow controller’s approach to forwarding requests based on a *predefined* destination address, rather than an ascertained destination.

Further, in order to arrive at the claimed limitations, the '264 reference would need to distribute the flow switch to different locations in the network, which would remove the flow switch's purpose of interfacing between the client and server sides of the network. In this regard, the Examiner's assertions that a user node is a system node and, implicitly, that the modified '264 reference teaches or suggests all of the claimed limitations, would render the flow controller in the '264 reference inoperable for its interfacing purpose. For example, a "peer to peer routing" approach would remove the need to forward any request to a server-side server as described, *e.g.*, in connection with FIG. 1C, and further would remove the interfacing nature of the flow controller. In view of the above, the '264 reference cannot be modified as asserted and, therefore, there is no motivation for making such a modification.

**MOTIVATION: The proposed modification lacks evidence of motivation.**

The Section 103 rejections also fail to establish a *prima facie* case of obviousness because the rejections fail to cite evidence of motivation for all of the proposed modifications of the primary '264 reference. This failure is in at least two areas, first in the apparent modification of the '264 reference in view of inherent teachings and/or the Examiner's interpretations of language in the claims, and second in the modification of the '264 reference with the '660 reference. Beginning with this first failure and referring to page 5 of the Final Office Action, the rejections fail to cite evidence for two acknowledged "missing" elements in the primary '264 reference. As background, the '264 reference specifies a flow controller that directs requests from users on a client-side to servers on a server side of the flow controller. The servers receive the request and control the subsequent routing of data accordingly; essentially, the flow controller simply picks a server to which to send a request. The Examiner's argument for asserting that the '264 reference teaches these missing elements focuses on assimilating the terms "user" node and "system" node by arguing that the terms can be used interchangeably. However, this comparison of the use of the terms "user" and "system" node fails to address modifying the '264 reference's flow controller to be implemented at a user node, thus failing to address the functionality of each term. That is, the comparison is not directly relevant to the use of such user and system nodes with the primary '264 reference, as applicable to the claimed invention; therefore, the comparison does not evidence motivation for modifying the '264 reference.

Furthermore, the flow switch of the '264 reference is not implemented with any end nodes, including client or server nodes, to control the routing of data. Instead, once a request is forwarded, the '264 reference's flow switch is finished with its job. Asserting correspondence between the '264 reference and the claimed limitations would require more, yet the Examiner has failed to cite any motivation for implementing the flow controller in this context, such as at one of the end nodes.

In addition to the above, the motivation alleged as supporting the modification of the '264 reference with the teachings of the '660 reference is unrelated to the purpose of the modification. For instance, the alleged motivation for "reducing the amount of hardware involved" is directed to the '660 reference's approach to implementing a load balancer in the software of a server; this alleged "motivation" does not support implementing a router in separate locations. In this regard, the alleged motivation actually teaches away from modifying the '264 reference to include a network-distributed routing controller (*e.g.*, where the flow controller in the '264 reference would be implemented in two different locations). Furthermore, while the '660 reference shows a load balancer separate from a server, the two are not distributed across a network (*i.e.*, coupled across the Internet 66 as shown in FIG. 8).

#### **THERE IS NO CORRESPONDENCE TO THE INVENTION AS A WHOLE:**

The Section 103 rejection also fails to teach or suggest all of the claimed limitations because certain limitations were not discussed in the Final Office Action and further because the asserted teachings actually discussed in the Final Office Action do not correspond to (teach or suggest) the claimed limitations as asserted. In addition, the Section 103 rejection relies upon the teachings of the '264 reference that were relied upon in the (improper) Section 102 rejection made in the previous Office Action. That is, while the '264 reference is used in the context of a new Section 103 rejection, the Examiner has provided no new arguments as to the teachings of the '264 reference and its applicability to various claim limitations. In this regard, the Applicant's arguments in the Office Action Response filed on January 7, 2005 still apply, the '264 reference fails to teach the claimed limitations as asserted by the Examiner and the Examiner's failure to address these arguments is contrary to the M.P.E.P. and 35 U.S.C. §132.

Beginning with claim 1, the rejection on page 4 of the Final Office Action asserts that the '264 reference teaches a network-distributed application routing controller is

“implemented in the network.” However, the rejection does not assert anywhere that the ‘264 reference teaches “a network-distributed application routing controller implemented in at least one user node and in at least one of the plurality of servers” as claim 1 is directed. Essentially, the rejection was not updated from the non-final Office Action to consider the amendments to the claims and, therefore, fails to cite teaching or suggestion of all claimed elements. Further, lines 48-58 of column 2 of the ‘264 reference are improperly asserted as teaching a network-distributed application routing controller, made in reference to independent claims 1, 33 and 34. Contrary to the assertion in the Office Action, this cited portion of the ‘264 reference refers to a flow switch (*e.g.*, content-aware flow switch 110 of FIG. 1c) that simply forwards a request for information to an appropriate server (*e.g.*, web server 100a, 100b or 100c) and acts as a “full duplex logical connection” (*see* column 5, line 65).

While the Office Action has not shown explicitly how data is routed in the ‘264 reference, it appears that one of the web servers responds to a request by sending data relative to the request through the flow switch and to a client (*see, e.g.*, column 5, line 62 through column 6, line 6). In this regard, the Office Action has not shown any information in the ‘264 reference that would indicate that the flow switch is a router in the context of the present invention or, more particularly, that the flow switch is network-distributed and directs routing of supplied data from a supply node to a requesting node. Further, the Office Action has not shown how the flow switch in the ‘264 reference ascertains a location of supplied data and, further, directs the routing of the supplied data from a source to a requesting destination. Referring to the cited portion of column 2 of the ‘264 reference, it appears that the flow switch in the ‘264 reference does not serve a content request; rather, the flow switch directs such a request to a server that can serve the request. Referring again to FIG. 1c of the ‘264 reference, once the flow switch passes along a request to a particular server, it is out of the loop for controlling the supplied data and simply waits for a response. Therefore, the flow switch does not “direct routing” of supplied data from a network node as claimed in the instant invention.

The Examiner’s citation to the secondary ‘660 reference improperly asserts that the ‘660 reference’s “load balancer,” which is implemented separately from a server, teaches the claimed limitations directed to a network-distributed approach. The ‘660 reference does show a load balancer (*see, e.g.*, FIG. 8) that can be implemented

separately from a server, but fails to show a routing controller implemented in a user node (*e.g.*, in the client browser 10). Essentially, the ‘660 reference adds nothing new, as the server side servers in the primary ‘264 reference are separate from the flow controller (*see, e.g.*, FIGs. 1b, 1c), with the flow controller of the ‘264 reference acting functionally similar to the load balancer in the ‘660 reference. In this regard, the ‘660 reference as modifying the ‘264 reference fails to teach or suggest a routing controller implemented in a user node.

Applicant also respectfully traverses the finality of the Office Action in that the Examiner failed to address and provide a response to the Applicant’s arguments regarding, for example, the asserted teachings of the primary ‘264 reference, the impropriety of the Section 112 rejections and the unsupported inherency-type arguments made in the Office Action Response filed on January 7, 2005. Specifically, while a new rejection has been made in the Final Office Action, the portions of the ‘264 reference that were relied upon in the previous Office Action are again relied upon in the Final Office Action. The Examiner’s failure to address and provide a response to the Applicant’s arguments is inconsistent with M.P.E.P. §707.07(f) and is further contrary to 35 U.S.C. §132, in that the Applicant has not been afforded the opportunity to consider and address the Examiner’s response as to the asserted teachings in the ‘264 reference. For instance, should the finality of the Office Action be preserved, the Applicant may not have an opportunity to evaluate and address any response of the Examiner regarding the impropriety of the assertions relating to the ‘264 reference, prior to proceeding to the Appeal Board. Applicant therefore requests that the Examiner remove the Finality of the Office Action Response, address the Applicant’s arguments in regard to the ‘264 reference (and otherwise) and afford the Applicant the opportunity to evaluate and address the Examiner’s concerns, should the claim rejections be maintained.

In view of the above, all of the Section 103 rejections are improper because the asserted portions of the cited references do not teach or suggest the limitations indicated in the Office Action. In this regard, further discussion of the other claim rejections should not be necessary. However, selected ones of the remaining rejections relating to dependent claims and otherwise are addressed as follows.

Referring to the rejection of claim 4, the cited portion of the ‘264 reference does not describe routing between two system nodes coupled to a server via a network, as

asserted. Instead, the cited portion (column 5, lines 43-51) of the ‘264 reference is directed to routing from a server to a client-side node, which is apparently being asserted as a system node, as shown in FIG. 1c. The cited portion of the ‘264 reference does not teach or suggest limitations directed towards routing data between two system or user nodes (*e.g.*, between two nodes on the client-side of FIG. 1c). Therefore, the assertion in the Office Action is incorrect and the rejections relying thereupon should be removed.

Regarding the rejection of claims 6 – 8, the Examiner appears to be making an inherency type argument without providing any support in the cited reference (or from the prior art) supporting the allegedly inherent teachings. To establish inherency, the extrinsic evidence “must make clear that the missing descriptive matter *is necessarily present in the thing described in the reference*, and that it would be so recognized by persons of ordinary skill.” *Continental Can Co. v. Monsanto Co.*, 948 F.2d 1264, 1268, 20 U.S.P.Q.2d 1746, 1749 (Fed. Cir. 1991) (emphasis added). “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *Id.* at 1269, 20 U.S.P.Q.2d at 1749 (quoting *In re Oelrich*, 666 F.2d 578, 581, 212 U.S.P.Q. 323, 326 (C.C.P.A. 1981)). In this instance, no such extrinsic evidence has been provided. Further, it is unclear as to why replication would be inherent with the subject matter in the ‘264 reference, as the cited portion of the ‘264 reference is directed to using a different server source, rather than replicating data. Therefore, the rejections based upon this inherent allegation are improper and, further, the ‘264 reference appears to teach away from the alleged inherent teachings. Additional allegations of inherency made in connection with the rejection of claims including claims 12 and 22 are improper for similar reasons.

Regarding the rejection of claims 13 and 14, the cited portion of the ‘264 reference does not, as Office Action asserts, teach limitations directed to the routing of data relative to an identified communication link having sufficient availability. Rather, the cited portions (column 16, line 66 through column 17, line 15) of the ‘264 reference appear directed to leveling, or equaling, flow from particular “virtual web hosts” rather than using a particular link based upon its availability. In this regard, the claim rejections relying upon this assertion are improper.



In view of the above discussion, Applicant believes that the rejections have been overcome and the application is in condition for allowance. A favorable response is requested. Should there be any remaining issues that could be readily addressed over the telephone, the Examiner is encouraged to contact the undersigned at (651) 686-6633.

Respectfully submitted,

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